STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	**)**	
	)	**ICC Docket No. 02-0864**
Filing to increase Unbundled Loop	**)**	
and Nonrecurring Rates	**)**	

JOINT CLECS' MOTION TO STRIKE VARIOUS PORTIONS OF THE TESTIMONIES OF SBC WITNESSES DR. KENT CURRIE, MS. VIVIAN GOMEZ-MCKEON, MR. JAMES SMALLWOOD, MR. LAWRENCE VANSTON AND MR. RANDALL WHITE, IBEW WITNESS MR. KASTNER AND STAFF WITNESS DR. QIN LIU

AT&T Communications of Illinois, Inc. ("AT&T"), McLeodUSA Telecommunications Services, Inc., RCN Telecom Services of Illinois, LLC, TDS Metrocom, LLC and WorldCom, Inc. d/b/a MCI ("MCI") (hereafter referred to as "Joint CLECs"), pursuant to the date set for filing Motions to Strike by the Administrative Law Judge ("ALJ") at the status hearing held on February 24, 2004, hereby move to strike portions of the rebuttal and/or surrebuttal testimonies and schedules of SBC witnesses David Barch, Dr. Kent Currie, Vivian Gomez-McKeon, James Smallwood, Lawrence Vanston and Randall White, IBEW Local 21 witness Ronald Kastner and Staff witness Dr. Qin Liu. The page numbers, line numbers and reasons for striking the relevant selected portions are discussed by topic below.

Much of the rebuttal and/or surrebuttal testimony and schedules of SBC witnesses that Joint CLECs are moving to strike relate to new or updated studies, or revisions to cost study methodologies, that SBC submitted in its rebuttal case in this docket. Both in reopening this docket in December 2003 and in denying Intervening CLECs' requests to extend the schedule in this proceeding to give the competitive local exchange carrier ("CLEC") parties adequate time to analyze and respond to SBC's massive "rebuttal"

case, the Commission made it clear that any new or revised studies submitted by SBC were subject to being stricken as improper rebuttal. Further, upon this case being reopened, SBC was given the opportunity to withdraw its original (December 2002) rate proposals and supporting cost studies and to file a new, updated case, but it declined to do so.

The CLECs (and other intervenors) had approximately four months to review, conduct discovery on and prepare and submit responsive testimony to SBC's original direct case, but only one month to prepare and submit testimony in response to SBC's rebuttal testimony. The fundamental point here is that one month was an adequate (or at least a typical) amount of time to review and respond to true rebuttal by SBC, not to respond to new or additional studies and significant changes to the methodologies used by SBC in its direct case. It would be patently unfair, and an infringement of the CLECs' due process rights, to admit the SBC testimony and studies that are the subject of this motion to strike.

The Staff testimony that is the subject of this motion should be stricken because, as detailed below, it constitutes detailed surrebuttal testimony (to which CLEC witnesses have no opportunity to respond) on two particular topics that was submitted by a Staff witness only *days* after she stated in a data request response that she had no familiarity with those topics. Had the Staff witness provided in her data request responses the same level of information on these topics that she included only days later in her surrebuttal testimony, the CLEC witnesses at least could have had an opportunity to address these topics in their surrebuttal, based on the Staff witness' data request answers.

Finally, Joint CLECs are moving to strike various portions of SBC's surrebuttal

testimony and attachments that is either not responsive to the CLECs' rebuttal testimony, or could and should have been included in SBC's direct or rebuttal testimony. SBC's inclusion of this testimony and attachments in its final round of surrebuttal has deprived CLEC witnesses of any opportunity to respond.

I. BACKGROUND

On December 19, 2003, the first status hearing on reopening was conducted in this proceeding. During that hearing, CLECs expressed a concern that the data upon which SBC's Total Element Long Run Cost ("TELRIC") studies rely is from 2000 and 2001 and, therefore, was not recent and did not comply with the desire stated by the United States Court of Appeals for the Seventh Circuit in its decision in *AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Company*, 349 F. 3d 402 (7 Cir. 2003) to have TELRIC rates based upon current, 2003 information. Moreover, the CLECs also expressed the concern that they had learned more about SBC's originally-filed cost studies since the CLECs had circulated their direct testimony in May 2003 and, in addition, that certain of the information they had submitted warranted an update. Because SBC bears the burden of proof in this proceeding[1], the Administrative Law Judge ("ALJ") left the decision as to whether to "pick up where we left off" or to file new, updated studies to SBC. At the December 19, 2003 status conference in this proceeding, counsel for SBC stated: "SBC is going to proceed with the case and the tariffs as they existed on May 9 [2003] when this docket was abated." Tr. at 211.

On January 20, 2004, SBC distributed its rebuttal testimony and schedules in this proceeding, consisting of the testimony of 19 witnesses who collectively submitted thousands of pages of testimony and schedules. On January 23, 2004, the Intervening

[1] See, e.g., 47 C.F.R. 51.505(e).

CLECs filed their "Reply Brief on Issues on Reopening of Intervening Competitive Local Exchange Carriers."[2] In that Reply Brief, the Intervening CLECs pointed out several instances in which SBC's "rebuttal" testimony incorporated numerous substantive revisions, alleged "updates" and changes to SBC's original filing, reflecting new data, developments and studies subsequent to the time of the original filing in December 2002. See Reply Brief of Intervening CLECs, pp. 3-4. SBC made these changes and submitted these new studies despite the fact that it represented to the ALJ at the December 19, 2003 status conference in this proceeding that it was going to proceed with the case and the tariffs as they existed on May 9 [2003] when this docket was abated – a representation that the Commission relied upon in determining that this case should move forward with a June 16 deadline.

After having a chance to review SBC's January 20, 2004 filing in more detail, AT&T filed a Supplemental Brief on January 29, 2004 and a Second Supplemental Brief filed on February 6, 2004 identifying numerous other new proposals and updates SBC had made to its direct case in its January 20, 2004 "rebuttal" filing. In each of these three pleadings, AT&T and the other Intervening CLECs moved that the schedule in this reopened proceeding be extended to provide additional time to adequately address these new and updated materials in this proceeding (rather than just the meager 30 days CLECs were given as a result of the Commission's directive that this reopened case be completed by June 16, 2004). The Joint CLECs' motion was presented to the Commission on February 10, 2004. The Commission, ostensibly focusing on the "expeditious" language set forth in the Seventh Circuit opinion in *AT&T v. Illinois Bell*, denied the CLECs'

[2] The Intervening CLECs' Initial Brief on Issues on Reopening had been filed, pursuant to schedule, on January 13, 2004.

motion. However, several Commissioners reiterated the point that Commissioners had made at the open meeting in December 2003 when the Commission reopened this case, that new studies or "updates" filed by SBC post-reopening would be subject to motions to strike -- indicating that the CLECs' appropriate remedy under the circumstances would be to move to strike such new and updated information.

Accordingly, the Joint CLECs are bringing this motion to strike selected rebuttal and surrebuttal testimony and schedules of several SBC witnesses, as well as the rebuttal testimony of IBEW Local 21 witness Ronald Kastner and a portion of the surrebuttal testimony of Staff witness Dr. Qin Liu.

II. TESTIMONY TO BE STRICKEN AND SUPPORTING REASONS

A. SBC Witnesses Dr. Currie and Mr. Barch and IBEW Local 21 Witness Ronald Kastner – Testimony Regarding Updated Labor Rates

In its rebuttal case filed January 20, 2004, SBC updated the labor rates it used in all of its fifteen nonrecurring cost studies. SBC does not even attempt (to its credit, we suppose) to justify the use of new labor rates as "rebuttal" to any of the Staff, CLEC or other intervenors' direct testimony – SBC witness Dr. Currie simply states that all of his nonrecurring cost studies have been "updated" to incorporate "the development of labor rates that rely on more current information." Currie Rebuttal Testimony, p. 8 (the new labor rates themselves are presented in the rebuttal testimony of SBC witness Barch.)

This is clearly a change to SBC's direct case regarding labor rates and, to the extent SBC's labor rates had changed as a result of its labor agreements, that fact was available to SBC at the time of the December 19, 2003 status conference. SBC opted not to update its labor rates by filing new nonrecurring cost studies; rather, in SBC's

"rebuttal" testimony, SBC witnesses Dr. Currie and Mr. Barch submitted revised nonrecurring cost studies that incorporate these updated labor rates. The direct, rebuttal and surrebuttal testimony of AT&T witness Mr. Flappan, however, addresses SBC's labor rates as they existed in May 2003 because SBC represented that it elected to stand on its cost studies as they existed in May 2003. Even if it had been appropriate for SBC to "update" its labor rates under the circumstances that SBC itself had created – and Joint CLECs contend it is not -- the labor rates permeate many of the cost studies in this docket and the time allotted in the schedule from the January 20, 2004 filing date to the February 20, 2004 filing date was simply inadequate in which to conduct discovery on SBC's "updated" labor rates, adjust them as necessary, and rerun all affected cost studies using labor rate inputs.

Contrary to SBC's representations and stated intentions, then, SBC is not "proceed[ing] with the case and the tariffs as they existed on May 9 when this docket was abated." Tr. 211. Rather, SBC has filed new nonrecurring cost studies and is ***not*** relying on SBC's case as it existed on May 9, 2003.

IBEW 21 witness Ronald Kastner's rebuttal testimony simply piggy backs on SBC's recommendation that the labor rates used in its now updated cost studies is appropriate. See, e.g., IBEW Local 21 Ex. 1.0, pp. 2-3, 9, 11. Since Mr. Kastner's rebuttal testimony is designed to support SBC's improperly updated cost studies, it too is fatally flawed and should be stricken.[3]

[3] To the extent that Mr. Kastner's rebuttal testimony is intended to support the general proposition that SBC's TELRIC prices should be based on labor rates from SBC's union contracts rather than on other measures of labor costs, Joint CLECs do not object to it on procedural grounds (although we will of course contest the point substantively). However, to the extent Mr. Kastner's testimony is specifically intended to support the use of SBC's "updated" labor rates based on a new union contract or contracts not reflected in SBC's original filing in this case, Joint CLECs object to Mr. Kastner's testimony and urge that it be stricken.

Therefore, the following portions of Mr. Barch's Rebuttal Testimony should be stricken: page 76, lines 1712-1713 and Schedules DJB-R8, DJB-R9, DJB-R10 and DJB-R11. The following portions of Mr. Barch's Surrebuttal Testimony should be stricken: page 23, lines 449-454.

The following portions of Dr. Currie's Rebuttal Testimony should be stricken: page 3, line 48 from "However" to the word "used" at line 50; p. 4, line 93; p. 5, lines 100-102; p. 8, lines 158-162 through the word "rates"; p. 19, line 427; p. 20, line 442 beginning with "the" through the word "rates" at line 443; p. 21, line 485 beginning with the word "First" through p. 22, line 489 at the word "rates"; and Schedules KAC-R1 through KAC-R13 and KAC-R15 through KAC-R17.

The following portions of IBEW Local 21 witness Ronald Kastner's Rebuttal Testimony should be stricken: page 2 starting at line 9 and continuing through page 3 line 5; page 9 line 15 continuing through line 23; and page 11 line 9 starting with the word "Rather" and continuing through line 10. In addition, to the extent Mr. Kastner purports to discuss the negotiation of rates and benefits that were not relied upon by SBC in its direct case and associated cost studies, the following material should also be stricken: page 5 starting at line 1 and continuing through page 7 line 12; and page 10 line 1 continuing through line 9.

B. SBC Testimony of Dr. Currie and Ms. Gomez-McKeon Applying Design Process Costs to Stand Alone UNE Loops

Joint CLECs move to strike the Rebuttal Testimony of Dr. Kent Currie[4] at page 21, lines 473-483 and the Surrebuttal Testimony of Dr. Kent Currie, page 24, lines 581-

[4] Currie Rebuttal Schedule KAC-R08 (Loop Prov) CONFIDENTIAL.pdf is the printout of the revised nonrecurring loop study, which applies the design process to stand alone POTS loops. Because this schedule includes numerous other data, it would be difficult to identify isolated portions of the study to be

583 as well as the following portions of the Rebuttal Testimony and Surrebuttal Testimony of Ms. Gomez-McKeon:

> Gomez-McKeon Rebuttal: p. 4 lines 77-80; p. 4 lines 86-87 starting with "or any" and ending with "loops)"; p. 5 lines 99-111[5]
>
> Gomez-McKeon Surrebuttal: p. 3, lines 60-68; p. 11, lines 234-241; p. 11, lines 242-245; p. 11-12, lines 246-260; and p. 12, lines 261-270.[6]

Specifically, Joint CLECs move to strike this testimony as improper rebuttal and surrebuttal, again based on the fact that Dr. Currie and Ms. Gomez-McKeon are attempting to make changes to SBC's direct case on the nonrecurring charges applicable to stand alone POTS loops. Again, these changes violate the fundamental premise of this docket – as well as SBC's express representation made in this docket -- that SBC would stand on its case as it was filed prior to abatement and reopening.

The Currie and Gomez-McKeon testimony that Joint CLECs are moving to strike violates this fundamental premise. In its direct testimony, SBC, through the direct testimonies of Dr. Currie and Ms. Gomez-McKeon, submitted nonrecurring cost studies that included design process costs for unbundled loops that are to be provisioned – at the request of the ordering CLEC – as part of an Enhanced Extended Link (or EEL) combination. Specifically, when it filed its original nonrecurring cost studies and

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stricken. It is straightforward, however, to remove SBC's design process modifications from the Excel version of the cost study by "undoing" the adjustments that Dr. Currie describes at page 21 of his rebuttal testimony – the testimony Joint CLECs seek to strike. In lieu of striking the entire nonrecurring loop study, Joint CLECs attach a matrix that lists every change required to remove the costs related to the stand alone loops being designed loops, as raised by SBC for the first time in rebuttal.

[5] Ms. Gomez-McKeon's rebuttal testimony never affirmatively states that she changed the nonrecurring unbundled loop cost study to include design costs for stand alone UNE loops; rather, she indicates that, in her opinion, stand alone loops should be designed.

[6] Ms. Gomez-McKeon has included most of the discussion of designed loop within the EEL discussion. However, in each Question and Answer, she addresses stand alone loops as well. These inferences to the stand alone loop cannot simply be eliminated from this discussion. Therefore, all discussion of designed loops should be stricken.

supporting testimony, SBC assumed that, with the exception of the standalone UNE loops comprising the "EEL" combination, all of the standalone UNE loops used to provide POTS service would be *non-designed* UNE loops; that is, these loops would not be required to undergo SBC's "design" process, which is a process that subjects the loop – which is presumably being used for a "Special Service" application – to rigorous testing. Not surprisingly, the nonrecurring charge for a loop that is subject to the design process is significantly higher than the charge for a loop that is not.

In its direct case circulated in May 2003, AT&T agreed that none of the stand alone UNE loops should be designed loops and, in fact, challenged SBC's assumption that UNE loops used as part of an EEL combination must undergo the design process.

The Joint CLECs were quite surprised, then, to discover that SBC's new, revised nonrecurring cost studies submitted as part of its "rebuttal" testimony are no longer based on the fundamental premise that stand alone UNE loops need not undergo the "design" process. Rather, SBC's new, revised nonrecurring cost studies are now based on the assumption that *all* stand alone UNE loops are required to undergo the rigorous testing and the other facets of SBC's design process. Put simply, the UNE loops that were non-designed loops in SBC's original filing are now, after SBC's "rebuttal" filing, designed loops. Not surprisingly, this revision significantly increases SBC's proposed loop nonrecurring charges.

There is no question that SBC was aware of this change in December 2003 at the time it decided to stand on its cost studies as they existed in May 2003. In fact, Ms. Gomez-McKeon acknowledges that SBC indicated in the TELRIC hearing before the Indiana Utility Regulatory Commission, in late September 2003, that it intended to

subject UNE loops to its design process. If Ms. Gomez-McKeon testified to that topic in September 2003 in Indiana as she indicates at page 3 of her surrebuttal testimony in this docket, then SBC was certainly aware at the time of the December 19, 2003 status hearing that this was a change it wanted to make to its existing cost studies. Yet SBC stated that it would stand on its original case. SBC should not now be allowed to introduce "rebuttal" testimony (to which CLECs were allowed only one month to respond) introducing such a major change; rather, the offending testimony should be stricken. In fact, AT&T's direct testimony in this case would have been different if, in its direct case, SBC had filed nonrecurring cost studies and testimony subjecting all UNE loops to the design process.

C. SBC Witness Lawrence Vanston on Depreciation Lives

The Joint CLECs also move to strike Schedules LKV-5, LKV-6 and LKV-7 to Mr. Vanston's rebuttal testimony – which consist of three new studies prepared by Mr. Vanston and/or others in his firm, Technology Futures Inc. ("TFI") -- and the following portions of Mr. Vanston's rebuttal and surrebuttal testimony that discuss and rely on the new studies presented in these schedules:

<u>Vanston Rebuttal Testimony</u>

Page 5, lines 96-110

Page 17, lines 217-222

Pages 14-15, Question and Answer 16 (including Figures 1 and 2)

Page 29, lines 619-623

Page 35, Question and Answer 47 (including Figure 3)

Pages 63-64, lines 1305-1315 (including Figure 8)

Vanston Surrebuttal Testimony

Page 9, Questions and Answers 12 and 13

Page 10, Question and Answer 14[7]

Mr. Vanston describes these schedules as "updated TFI research" at page 5 of his rebuttal. Mr. Vanston does not purport to offer these schedules in rebuttal to any witness. Rather, he offers them generally to support his assertions that his direct testimony was correct and the positions of the Staff and intervenor witnesses are wrong. Further, the three new studies he submits on rebuttal are massive, aggregating over 360 pages (in comparison to original studies totaling about 120 pages submitted with his direct testimony.) These studies and the related testimony constitute new direct testimony submitted in rebuttal. CLECs and other intervenors cannot reasonably have been expected to have had an adequate opportunity to conduct discovery on, analyze and respond to these new studies in the one month they were allowed to prepare and submit their rebuttal testimony. Further, this situation is made even more egregious by Mr. Vanston's frequent assertions throughout his rebuttal and surrebuttal that other parties have failed to show specific errors or other problems in his forecasts and studies. Schedules LKV-5, LKV-6 and LKV-7 and the related testimony identified above should be stricken as improper rebuttal.

D. Surrebuttal Testimony of Staff Witness Dr. Qin Liu

[7] There are likely other portions of Mr. Vanston's rebuttal and surrebuttal testimony that are based on his new studies and should be stricken. In a number of places Mr. Vanston makes reference to his or his firm's forecasts or studies without providing a citation to the specific study being relied on. Cross-examination may be necessary to identify which of these statements are referring to or relying on the forecasts and studies on which Mr. Vanston based his direct testimony, and which are based on the new studies he has submitted with his rebuttal testimony.

Joint CLECs also move to strike the following portions of the Surrebuttal Testimony of Staff witness Dr. Qin Liu, circulated on March 5, 2004:

Page 31, line 660 through page 40, line 867

In support, the Joint CLECs state as follows:

In the Direct Testimony of Staff witness Mr. Bud Green submitted on May 6, 2003, Mr. Green stated Staff's position that the Commission should continue to require SBC to use the target fill factors to set loop rates that the Commission adopted in its Order dated February 17, 1998 in ICC Docket No. 96-0486/0569.

Engaging in a 180 degree turnaround, Staff witness Dr. Qin Liu circulated rebuttal testimony on January 20, 2004 presenting a new and different Staff position on fill factors. Specifically, in her Rebuttal Testimony, Dr. Qin Liu introduced a new concept which she coined "forward looking actual fill." See Liu Rebuttal, Staff Ex. 17.0, page 38. However, even in her rebuttal testimony, Dr. Liu did not present recommended fill factor values under her new "forward looking actual fill" concept. Instead, Dr. Liu indicated in her rebuttal testimony that she was in the process of collecting information and planned to present her recommendations on the specific values of "forward looking actual fill" for the first time in her February 20, 2004 surrebuttal testimony. If she could not gather the necessary information, Dr. Liu indicated that, consistent with the recommendation of Staff witness Mr. Green, she would continue to recommend that the Commission use the target fills it adopted in the previous TELRIC proceeding. *Id.*

Recognizing that they would not see Dr. Liu's proposed fill factors under this new approach until Dr. Liu's February 20 testimony, and realizing they would then have just one opportunity to address her proposed fill factors – i.e., during the March 5 (final)

round of testimony – Joint CLEC witnesses Mr. Starkey and Mr. Fischer propounded data requests to Staff witness Dr. Liu to learn more about her new fill factor concept and upon what information she relied in formulating it.

On January 27, 2004, Mr. Starkey and Mr. Fischer served data requests MS-115 through MS-118 inquiring into Dr. Liu's familiarity with FCC Orders issued subsequent to its *Local Competition Order* addressing fill factors. Specifically, these orders are the FCC's *USF Inputs Order* and its *Virginia Arbitration Order.* Staff objected to each of these requests to the extent it believed the data requests mischaracterized the FCC's Orders. Consequently, Mr. Starkey and Mr. Fischer served clarifying data requests MS-147 through MS-150 on February 11, 2004 inquiring into Dr. Liu's understanding of whether the FCC's *USF Inputs Order* and its *Virginia Arbitration Order* apply to the fill factor determinations in this proceeding and, if so, how and, if not, why not.

Data Requests MS-147 through MS-150 requested the following information:

> MS-147: Referring to pages 36 – 37 of Dr. Liu's rebuttal testimony, please state whether Dr. Liu agrees or disagrees that the FCC's further clarification on appropriate demand assumptions for cable fill factors in its *USF Inputs Order* (10th Report and Order, FCC 99-304, released November 2, 1999) is applicable in a TELRIC proceeding. If Dr. Liu disagrees, please explain in detail why she disagrees.
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> MS-148: Referring to pages 36 – 37 of Dr. Liu's rebuttal testimony, please state whether Dr. Liu agrees or disagrees that the FCC affirmed the applicability of its *USF Inputs Order* demand assumptions in TELRIC proceedings for fill factor determination in DA 03-2738 (*Virginia Arbitration Order*), ¶¶ 247 and 254, released August 29, 2003. If Dr. Liu disagrees, please explain in detail why she disagrees.
>
> MS-149: Referring to pages 36 – 37 of Dr. Liu's rebuttal testimony, please state whether Dr. Liu agrees or disagrees that the FCC's rejection of projections of total demand based on ultimate demand in its *USF Inputs Order*, ¶¶ 199-202, is applicable in TELRIC proceedings. If Dr. Liu agrees, please state whether Dr. Liu's definition of "accumulated future

> demand" is based on the concept of ultimate demand. If Dr. Liu disagrees, please explain in detail why she disagrees.
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> MS-150: Referring to pages 36 – 37 of Dr. Liu's rebuttal testimony, please state whether Dr. Liu agrees or disagrees that the FCC's requirement to use current demand in USF determinations, which includes a reasonable amount of excess capacity to accommodate short-term growth, is also applicable in a TELRIC proceeding. (*USF Inputs Order*, Fn 761). If Dr. Liu agrees, please state whether Dr. Liu's definition of "accumulated future demand" is based on the concept of current demand as defined by the FCC in the *USF Inputs Order*. If Dr. Liu disagrees, please explain in detail why she disagrees.

On February 27, 2004, Staff responded to these data requests, first objecting to them to the extent they ask for a legal opinion and are vague and ambiguous. Subject to and without waiving its objections, Staff responded to these data requests by indicating that Dr. Liu lacks sufficient familiarity with the *USF* Inputs Order and the *Virginia Arbitration Order* to determine whether they are relevant to the LoopCAT cost model proffered by SBC in this proceeding and that Dr. Liu lacks sufficient familiarity with the FCC cost models that resulted in the *USF Inputs Order* or the *Virginia Arbitration Order* to determine whether the demand assumptions are relevant to SBC's LoopCAT cost model. Specifically, Staff responded (after objection) as follows:

Staff Response to MS-147

> Dr. Liu cannot respond to AT&T Data Request MS-147 because – to the extent it calls for a non-legal opinion -- the question presented is vague and confusing. Additionally, Staff witness Dr. Liu does not have sufficient familiarity with the FCC cost model utilized in the FCC proceeding that resulted in the *USF Inputs Order* to determine whether or how the "demand assumptions for cable fill factors" in the *USF Inputs Order* are relevant to the SBC LoopCAT cost model being utilized in this proceeding.

Staff Response to MS-148

> Dr. Liu cannot respond to AT&T Data Request MS-148 because – to the extent it calls for a non-legal opinion -- the question presented is vague

and confusing. Additionally, Staff witness Dr. Liu does not have sufficient familiarity with the FCC cost model utilized in the FCC proceeding that resulted in the *Virginia Arbitration Order* to determine whether or how the "demand assumptions" applied are relevant to the SBC LoopCAT cost model being utilized in this proceeding.

Staff Response to MS-149

Dr. Liu cannot respond to AT&T Data Request MS-149 regarding "the FCC's rejection of projections of total demand based on ultimate demand in its *USF Inputs Order*" because – to the extent it calls for a non-legal opinion -- the question presented is vague and confusing. Additionally, Staff witness Dr. Liu does not have sufficient familiarity with the FCC cost model utilized in the FCC proceeding that resulted in the *USF Inputs Order* to determine whether or how "the FCC's rejection of projections of total demand based on ultimate demand in its *USF Inputs Order*" are relevant to the SBC LoopCAT cost model being utilized in this proceeding.

As used by Dr. Liu in her testimony, the phrase "future demand" refers to the demand in the FCC hypothetical network in the future, and the phrase "accumulated future demand" is the present value of current demand and all future demands.

Staff Response to MS-150

Dr. Liu cannot respond to AT&T Data Request MS-150 because – to the extent it calls for a non-legal opinion -- the question presented is vague and confusing. Additionally, Staff witness Dr. Liu does not have sufficient familiarity with the FCC cost model utilized in the FCC proceeding that resulted in the *USF Inputs Order* to determine whether or how "the FCC's requirement to use current demand in USF determinations, which includes a reasonable amount of excess capacity to accommodate short-term growth" are relevant to the SBC LoopCAT cost model being utilized in this proceeding.

Due to Dr. Liu's stated lack of familiarity with these FCC models and orders, Messrs. Starkey and Fischer were unable to challenge or rebut Dr. Liu's understanding of these models and orders in their final round of testimony submitted on March 5, 2004, despite having been diligent in pursuing this information.

Yet in her surrebuttal testimony filed on March 5, 2004, at lines 660-857, Dr. Liu discusses the *USF Inputs Order* and the *Virginia Arbitration Order* at length, despite having responded less than seven days earlier that she was not familiar with such Orders and their underlying cost models.[8] Not only does she discuss these orders at length, she espouses interpretations of them and reaches conclusions based on them as they relate to the fill factors in this proceeding.

To the extent Dr. Liu's proposal was impacted by the *USF Inputs Order* and/or the *Virginia Arbitration Order*, the impact of these Orders, which were raised by Messrs. Starkey and Fischer, should have been addressed by Dr. Liu in her January 20, 2004 or February 20, 2004 testimony or, at the very latest, when the Joint CLECs requested that information through discovery in advance of filing their last round of testimony. In fact, Dr. Liu opined in her February 20, 2004 rebuttal testimony (page 11, lines 215-220) that the FCC had "… not provided any instructions on how to develop fill factors beyond the general guideline that the fill factors should reflect the 'projection of the actual total usage,' and the TELRIC methodology 'is designed to calculate the total cost of building a new efficient network.'"

If Dr. Liu believed that the FCC's *USF Inputs Order* and its *Virginia Arbitration Order* did not provide further instructions or guidelines, she should have stated her opinion in the January 20, 2004 rebuttal round (in rebuttal to the testimony the CLECs filed in May prior to abatement) or in the February 20, 2004 rebuttal round. Moreover, even if she had not done that, if she had at least responded to the AT&T data requests that sought information on how these very orders impacted her proposal with the same level

[8] In a remarkable and astounding act by a Commission Staff witness, Dr. Liu's March 5 surrebuttal testimony consists almost entirely of defending *SBC* witnesses against criticisms by CLEC witnesses Starkey and Fischer.

of information that she larded into her surrebuttal testimony only a week later, CLEC witnesses Starkey and Fischer could have responded in their surrebuttal testimony, based on her data request answers. To allow Dr. Liu to now include such a discussion in her surrebuttal testimony -- after claiming lack of familiarity with these orders just days earlier, in response to timely AT&T data requests -- is inherently inequitable and unfair and deprives Joint CLECs of their fundamental right to respond and, therefore, deprives them of due process.[9] Because Dr. Liu professed lack of familiarity with these FCC orders in her data request responses, she should be precluded from discussing these orders in her surrebuttal testimony.

Thus, page 31, line 660 through page 40, line 867 of Dr. Liu's surrebuttal testimony should be stricken as improper surrebuttal and a violation of due process.

E. Surrebuttal Testimony of SBC Witness Mr. James R. Smallwood

1. In his January 20 rebuttal testimony, Mr. Smallwood proposes and explains certain modifications he made to SBC's LoopCAT model, which he contends were made in response to Staff and intervenor direct testimony in this matter. In the CLEC rebuttal testimony submitted on February 20, AT&T witnesses Messrs. Pitkin and Turner identified four additional LoopCAT modifications made by Mr. Smallwood that were wholly unexplained: (1) SBC changed its mix of Digital Loop Carrier (DLC) sizes, (2) SBC included DLC-COT (Central Office Terminal) investment, (3) SBC changed its

[9] No credible reason – other than the obvious intent to come up with a set of fill factor values more supportive of SBC's position – has been given as to why Dr. Liu could not have introduced both the "forward looking actual fill factors" concept, and her specific propose fill factor values, in Staff's *direct* testimony filed in May 2003. Indeed, Dr. Liu at that time filed direct testimony on other topics. Had Dr. Liu presented this testimony in Staff's direct case (rather than initially presenting the new concept in rebuttal and initially presenting her recommended fill factor values in surrebuttal), then CLECs and other parties could have responded in proper sequence, and we would not be in the situation in which Staff witness Liu has introduced even more new information in her last round of surrebuttal testimony, leaving the CLEC witnesses with no further opportunity to respond.

application of sales taxes, and (4) SBC changed the calculation of DS-X-1 Jack COT Termination frames. *See* Pitkin/Turner Rebuttal (AT&T Ex. 2.1) at 56-62. In his surrebuttal, Mr. Smallwood improperly attempts to provide back-ended explanations for these undocumented adjustments – explanations that Mr. Smallwood could have and should have provided in his rebuttal testimony. If this surrebuttal testimony of Mr. Smallwood is allowed in the record, the CLECs will have had no opportunity to respond to SBC's after-the-fact explanation for these significant LoopCAT modifications and, therefore, this testimony should be stricken. The offending testimony is as follows:

- Smallwood Surrebuttal (SBC Exhibit 4.2) p. 21 lines 452 through 471 (Question 38). In this testimony, Mr. Smallwood provides, for the first time on the record, an explanation of why SBC shifted the mix of its DLC-RTs.
- Smallwood Surrebuttal, p. 28, lines 612 through 632 (Question 50). Mr. Smallwood, for the first time, provides an explanation for his inclusion of "cluster vendor" material costs for DLC-COT equipment in LoopCAT.
- Smallwood Surrebuttal, p. 29, lines 638 through 660 (Questions 52 and 53). In this testimony Mr. Smallwood provides, for the first time, an explanation why SBC made two previously unexplained changes to LoopCAT: (1) application of sales tax to DLC equipment, and (2) change in SBC's calculation of DSX-1 Jack costs.

2. There are other portions of Mr. Smallwood's surrebuttal testimony that are improper. During direct and rebuttal rounds, the parties engaged in a debate concerning the appropriate percentage of IDLC loops to be assumed in LoopCAT. In their rebuttal, AT&T witnesses Pitkin/Turner provide two pages of testimony on this subject in which

they "encourage the commission to review [their] primary argument regarding the use of the most efficient least cost IDLC technology" and otherwise provide citations to the Indiana Commission's finding on this matter and the FCC's *Virginia Arbitration Order*, in which the FCC Wireline Competition Bureau required the assumption of 100% IDLC in TELRIC cost studies. *See* Pitkin/Turner Rebuttal at 67-68. Messrs. Pitkin/Turner provide no other testimony on the subject matter.

Nonetheless, Mr. Smallwood's surrebuttal testimony -- under the pretense of a response to Messrs. Pitkin/Turner's reference to FCC guidelines -- provides significant engineer-based testimony on the subject of IDLC unbundling. *See* Smallwood Surrebuttal, at pp. 26-27, lines 550-578 (Questions 43-46). None of this testimony addresses the FCC directives cited by Messrs. Pitkin/Turner. To the contrary, this testimony merely provides duplicative engineering testimony that could have and should have been included in SBC's January 20 rebuttal testimony. None of this testimony is responsive to anything Messrs. Pitkin/Turner said in rebuttal and, therefore, it should be stricken.

Finally, Mr. Smallwood provides improper surrebuttal testimony in response to Messrs. Pitkin/Turner's allegation (in their rebuttal) that Mr. Smallwood failed to address each of their arguments regarding why installation loading factors are inappropriate. *See* Pitkin/Turner Rebuttal at 15-16. In surrebuttal, Mr. Smallwood not only claims that he has already responded to those AT&T arguments (which should have ended his surrebuttal testimony on the subject), he goes on to state: "However, I will specifically respond to each the criticisms listed by Messrs. Pitkin/Turner" ostensibly "to ensure that SBCI's position is clear on each of these issues." Smallwood Surrebuttal at 33 lines 723-

725. Mr. Smallwood then provides a two-page, single-spaced response to each of the arguments that Messrs. Pitkin/Turner raise **in their direct testimony**. In doing so, Mr. Smallwood raises arguments that are not only off base, but arguments that have also never been raised before in this proceeding. In short, Mr. Smallwood, in surrebuttal testimony, is for the first time providing his arguments in response to Messrs. Pitkin/Turner's criticisms of linear loading factors – criticisms AT&T provided as part of its direct case. These SBC counter arguments should have been brought in SBC's rebuttal filing and are not responsive to any new argument raised by Messrs. Pitkin/Turner in rebuttal. Therefore, the following Smallwood Surrebuttal testimony should be stricken: page 33, line 723 starting with word "however" through and including line 812 on page 35.

F. Surrebuttal Testimony of SBC Witness Mr. Randall White

1. At pages 26 through 27 of his surrebuttal testimony, SBC witness Mr. Randall White responds to Pitkin/Turner's testimony, cited above, which provides citations to the portions of the *Virginia Arbitration Order* addressing the percentage of IDLC loops to be assumed in a TELRIC cost study. As part of that response, Mr. White provides a new exhibit, attached to his surrebuttal as RSW-SR3, which he claims is an AT&T *ex parte* to the FCC, dated December 4, 2002. Mr. White characterizes the contents of that document as being somehow contrary to the positions taken by AT&T in this docket. That attachment, and corresponding testimony, should be stricken for two reasons. First, SBC could have and should have attached this document to its rebuttal testimony, in which Mr. White provided significant testimony disagreeing with Messrs.

Pitkin/Turner's conclusions concerning the technical capabilities of IDLC systems. Instead, SBC sat on this document until the last round of testimony, knowing that AT&T then could not respond to it. Second, this testimony is not responsive to anything in Messrs. Pitkin/Turner's rebuttal. In that rebuttal, Messrs. Pitkin/Turner simply cite back to their direct testimony on this subject and provide citations to the Indiana Order and the *Virginia Arbitration Order*. Pitkin/Turner Rebuttal at 67-68. By SBC holding back this one-and-a-half year old *ex parte* until the very last round of testimony, SBC has given AT&T no ability to provide sworn testimony explaining either (i) the context in which that document was provided to the FCC or (ii) why SBC is severely distorting its contents. Therefore, the following pieces of Mr. White's Surrebuttal testimony should be stricken: RSW-SR3 and the testimony at page 27 line 597 (starting with the words "In fact") through and including line 602.

2. Other pieces of Mr. White's testimony are not proper surrebuttal. First, for the same reasons Mr. Smallwood's engineering testimony concerning IDLC should be stricken, Mr. White's testimony on the same subject should also be stricken: White Surrebuttal at p. 28, line 621 (starting with words "To understand") through and including p. 30 line 680. Messrs. Pitkin/Turner do not provide additional engineering testimony on this subject in their rebuttal, as they merely provide citations to the Indiana Order and the *Virginia Arbitration Order*. Pitkin/Turner Rebuttal at 67-68. Thus, none of this testimony is proper surrebuttal testimony and should be stricken.

3. In his surrebuttal at pp. 24-25, Mr. White also provides testimony purportedly responding to Messrs. Pitkin/Turner's statement that Mr. White's rebuttal "is trying to provide excuses" for SBC witness testimony in California, including SBC

California witness Ms. Bash. In response, Mr. White takes issue with this characterization, largely reiterating his rebuttal testimony on this subject. However, at the very end of this answer, Mr. White provides, as RSW-SR1, a copy of an exhibit SBC witness Ms. Bash presented in evidence in California, which Mr. White claims "demonstrates" that the installed cost of DLC-RT generally exceeds the cost estimates provided. Mr. White should have and could have provided this exhibit in his rebuttal testimony. Indeed, in his rebuttal testimony Mr. White referenced this Bash exhibit, but failed to include it as an attachment. *See* White Rebuttal at p. 46 lines 1027-1031. CLECs are now prejudiced by not being able to respond to this new evidence – which was responsive to our direct filing, not our rebuttal. Attachment RSW-SR1 and the supporting testimony (p. 25 line 550 starting with words "A copy of" through line 551) of Mr. White's Surrebuttal Testimony should be stricken.

4. In his rebuttal testimony, Mr. White took issue with Messrs. Pitkin/Turner's reliance on SBC's JAM estimator tool to generate reliable installation costs, arguing that the costs of certain activities (or "steps" in his words) are not included in JAM. White Rebuttal at pp. 39-43. In response, in their own rebuttal testimony, Messrs. Pitkin/Turner point out that the costs for the activities cited by Mr. White are accounted for by factors that LoopCAT applies, e.g, engineering, land and building factors, etc. *See* Pitkin/Turner Rebuttal at 66. In his surrebuttal testimony, Mr. White responds to this Pitkin/Turner testimony with a statement, referring back to his direct testimony. *See* White Surrebuttal at p. 25, lines 557-562. At the end of this answer, however, Mr. White then introduces new evidence in the form of Schedule RSW-SR2, which not only identifies and further "describes" each of the "steps" Mr. White

references in his rebuttal, but further provides time estimates for each of these steps. Clearly, this exhibit is evidence that should have and could have been presented in rebuttal testimony by Mr. White, and represents new evidence that is not responsive to Messrs. Pitkin/Turner's limited arguments contained in rebuttal. The CLECs are severely prejudiced by not being able to provide responsive testimony to this exhibit, and the activities and labor times assumed therein. For these reasons, the following testimony should be stricken from Mr. White's Surrebuttal testimony: Page 25, Line 562 through and including line 564 as well as Schedule RSW-SR2.

III. CONCLUSION

For the reasons set forth in this Motion, the Joint CLECs respectfully request that the Commission strike the above-referenced rebuttal and surrebuttal testimony and schedules as improper, inequitable, a violation of due process and in direct contradiction

of SBC's choice to stand on its testimony and cost studies as they existed in May 2003.

Dated: March 11, 2004

Respectfully submitted,

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